DATO' MOHD FATHI HJ AHMAD A

v.

DATO' DR CHEN LIP KEONG & ORS AND ANOTHER CASE

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUITS NO: D2(D3)-22-1218-1990 & D3-22-1101-1989]
6 FEBRUARY 2009

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BANKRUPTCY: *Capacity of bankrupt - Competency to maintain an action - Bankrupt's suit filed before bankruptcy - Suit suspended after bankruptcy pending DGI's sanction - Suit struck out on case management mention due to counsel's failure to attend court - Whether DGI's sanction required to reinstate suit - Whether s. 38(1)(a) of the Bankruptcy Act 1967 applicable - Bankruptcy Act 1967, s. 38(1)(a)*

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BANKRUPTCY: *Official assignee - Sanction - Bankrupt's suit filed before bankruptcy - Suit suspended after bankruptcy pending DGI's sanction - Suit struck out on case management mention due to counsel's failure to attend court - Whether DGI's sanction required to reinstate suit - Whether s. 38(1)(a) of the Bankruptcy Act 1967 applicable - Bankruptcy Act 1967, s. 38(1)(a)*

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CIVIL PROCEDURE: *Striking out - Action - Application to reinstate - Suit struck out on case management mention due to non attendance of plaintiff's counsel - Whether inappropriate to apply normal test applicable in cases where suit struck out for non attendance of party - Whether sufficient for court to ascertain whether there was valid reason for counsel's failure to attend court on the mention date*

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The plaintiff had filed his suit against the defendants before he was adjudged a bankrupt. After his bankruptcy, the suit was suspended pending the sanction of the Director General of Insolvency ('the DGI') permitting the plaintiff to continue with the suit. The suit was fixed for case management to determine its future direction. However, on the mention date, the plaintiff's counsel's car punctured a tyre and he arrived half-an-hour late in court to find the suit struck off. He promptly applied to reinstate the suit. His application was objected to by the lawyers for the defendants, *inter alia* on the basis that: (i) the plaintiff's counsel was not competent to reinstate the suit without first obtaining the sanction of the DGI; (ii) the plaintiff's counsel's mere assertion that his car had punctured a tyre and that he was unable to attend court in time was insufficient; and (iii) the reinstatement was not sustainable under s. 38(1)(a) of the Bankruptcy Act 1967.

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Held (allowing the reinstatement of the suit):

(1) The suit was only fixed for case management when it was struck out. It was unnecessary and inappropriate to apply the normal test applicable in cases where a suit is struck out for non-attendance of a party at a trial. (para 7)

(2) Section 38(1)(a) of the Bankruptcy Act 1967 should not apply in the instant case so as to require the plaintiff to obtain the sanction of the Director General of Insolvency. The application was merely an application to reinstate a suit already in existence and not to "maintain" an action. The application to reinstate was a right derived from an action already in existence. Until and unless the court finally disposes of the suit one way or other, that right would subsist. (para 9)

(3) The suit was struck out on account of the failure of counsel to attend before the judge on time and not on the merits of the case. The court only needed to satisfy itself that there was a valid reason for counsel's failure to attend court on the day and time fixed for the mention. There was no reason to disbelieve that counsel's failure to attend court was due to the puncture of his car tyre and that he had in fact turned up only half an hour after the commencement of proceedings in court. (paras 10 & 11)

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)(a)

For the plaintiff - Datuk Mokhtar Ngah; M/s Mokhtar Ngah & Co
For the 1st, 2nd & 4th defendants - Felix Raj (Simon Hong with him); M/s Shaikh David Raj
For the 3rd defendant - James Khong; M/s Sreenevasan

Reported by Andrew Christopher Simon

JUDGMENT

Kang Hwee Gee J:

[1] This is an application for reinstatement of a suit which was fixed for mention by the judge in court D2 for the purpose of settling an issue pertaining to the status of the plaintiff who was a bankrupt in this suit. The suit was filed by the plaintiff before he was adjudged bankrupt and had to be suspended pending the sanction of the Director General of Insolvency to permit him to continue with this suit.

Datuk Mokhtar Ngah For The Plaintiff

[2] Refer to my affidavit in encl. 187 – reasons for my failure to attend court for mention in this case on 17 July 2008 was due to my car breaking down about half a mile from the court. It was a Mercedes Benz 300 of 2002 vintage. The left front near side tyre had punctured and I had to drive it slowly to a tyre shop in nearby Segambut. I arrived at the court at about 9.30am to 9.40am but the case had been called up for mention and counsel for the other parties had left. This suit has been struck off. I waited until 11.30am but could not see the judge as she was busy with other cases.

[3] Hence on 23 July 2008 I filed this application to reinstate this suit five days later.

[4] The case has come a long way having gone to the Supreme Court which had made an order that it be heard together with another case D1-22-1101-1989 which is still alive and pending.

Mr Felix Raj For The 1st, 2nd And 4th Defendants In This Suit And The Plaintiffs In The D1-22-1101-1989 Suit

i. Submits skeletal submission – basically objection is on incapacity of the plaintiff or his counsel to apply to reinstate without first obtaining the sanction of the Director General of Insolvency pursuant to s. 38(1)(a) of the Bankruptcy Act 1967.

ii. Mere assertion without more that his car broke down and therefore unable to attend court on time is insufficient.

iii. Whether the plaintiff tendered or presented sufficient materials in his application to show that he has a plausible or arguable claim.

Mr James Khong For The 3rd Defendant In This Suit

[6] At the time of filing of the reinstatement application there was no sanction from the Director General of Insolvency to permit the plaintiff from continuing with the action and there was also no sanction from the Director General of Insolvency allowing the solicitor Datuk Mokhtar Ngah to act for the plaintiff in the suit. In this regard the reinstatement application is unsustainable under s. 38(1)(a) of the Bankruptcy Act 1967 which reads as follows:

A 38(1) Where a bankrupt has not obtained his discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

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Decision

[7] It would appear that the case was only fixed for case management to determine its future direction on 17 July 2008 when the parties were required to attend before the judge of court D2,
C Puan Noor Azian bt. Shaari J.

[8] It would not be necessary and indeed inappropriate to apply the normal test applicable to cases where a suit is struck out for non attendance of a party at a trial.

D **[9]** Section 38(1)(a) of the Bankruptcy Act 1967 should not apply in this case to require the judgment debtor to obtain the sanction of the Director General of Insolvency as it is merely an application to reinstate a suit already in existence and not to "maintain" an action. The application to reinstate is a right which
E is derived from an action already in existence. Until and unless the court finally disposes the suit one way or other, that right subsists.

[10] The suit was struck out only on account of the failure of counsel to attend before the judge on time and not on the merits
F of the case. All that would be necessary in this case is for the court to satisfy itself that there is a valid reason for counsel's failure to attend court on the day and time fixed for mention.

[11] There is no reason to disbelieve that his failure to attend court for mention before Puan Noor Azian J was due to the
G puncture of his car and that he had in fact turned up at 9.30am only half an hour after the commencement of proceedings at the court.

[12] The suit is to be reinstated and returned to *status quo* for
H mention at the date to be determined by the Managing Judge.

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